

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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TARA DEVITA,

13-CV-5607 (LTS)

Plaintiff,

**ANSWER**

-against-

PHILLIPS & MILLMAN, LLP, JEFFREY T. MILLMAN,  
ESQ., JOEL A. GROSSBARTH, ESQ. and TOGNINO  
& GROSSBARTH, LLP,

Defendants.  
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Defendants, PHILLIPS & MILLMAN, LLP and JEFFREY T. MILLMAN, ESQ. (hereinafter "Defendants"), by their attorneys, KAUFMAN BORGEEST & RYAN LLP, hereby respond to Plaintiff's First Amended Complaint (hereinafter "the First Amended Complaint") as follows:

**THE PARTIES**

1. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "1" of the First Amended Complaint.
2. Defendants admit the truth of the allegations contained in paragraph "2" of the First Amended Complaint.
3. Defendants admit the truth of the allegations contained in paragraph "3" of the First Amended Complaint.
4. Defendants admit the truth of the allegations contained in paragraph "4" of the First Amended Complaint.
5. Defendants admit the truth of the allegations contained in paragraph "5" of the First Amended Complaint.
6. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "6" of the First Amended Complaint.

7. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "7" of the First Amended Complaint.

8. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "8" of the First Amended Complaint.

9. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "9" of the First Amended Complaint.

#### **JURISDICTION & VENUE**

10. Defendants deny the truth of the allegations contained in paragraph "10" of the First Amended Complaint and refer all questions of law to the court.

11. Defendants deny the truth of the allegations contained in paragraph "11" of the First Amended Complaint and refer all questions of law to the court.

12. Defendants deny the truth of the allegations contained in paragraph "12" of the First Amended Complaint and refer all questions of law to the court.

#### **FACTUAL BACKGROUND**

13. Defendants admit the truth of the allegations contained in paragraph "13" of the First Amended Complaint.

14. Defendants deny the truth of the allegations contained in paragraph "14" of the First Amended Complaint.

15. Defendants deny the truth of the allegations contained in paragraph "15" of the First Amended Complaint.

16. Defendants deny the truth of the allegations contained in paragraph "16" of the First Amended Complaint.

17. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "17" of the First Amended Complaint.

18. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "18" of the First Amended Complaint.

19. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "19" of the First Amended Complaint.

20. Defendants deny the truth of the allegations contained in paragraph "20" of the First Amended Complaint.

21. Defendants deny the truth of the allegations contained in paragraph "21" of the First Amended Complaint.

22. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "22" of the First Amended Complaint.

23. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "23" of the First Amended Complaint.

24. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "24" of the First Amended Complaint.

25. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "25" of the First Amended Complaint.

26. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "26" of the First Amended Complaint.

27. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "27" of the First Amended Complaint.

28. Defendants deny the truth of the allegations contained in paragraph "28" of the First Amended Complaint.

29. Defendants admit that Phillips & Millman, LLP was retained by plaintiff, deny that Jeffrey T. Millman, Esq. was retained by plaintiff and otherwise deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "29" of the First Amended Complaint.

30. Defendants deny the truth of the allegations contained in paragraph "30" of the First Amended Complaint as it sets forth the wrong standard of care.

31. Defendants admit the truth of the allegations contained in paragraph "31" of the First Amended Complaint.

32. Defendants admit the truth of the allegations contained in paragraph "32" of the First Amended Complaint.

33. Defendants admit the truth of the allegations contained in paragraph "33" of the First Amended Complaint.

34. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "34" of the First Amended Complaint.

35. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "35" of the First Amended Complaint.

36. Defendants deny the truth of the allegations as to Phillips & Millman, LLP and Jeffrey T. Millman, Esq. and otherwise deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "36" of the First Amended Complaint.

37. Defendants admit the truth of the allegations contained in paragraph "37" of the First Amended Complaint.

38. Defendants admit the truth of the allegations contained in paragraph "38" of the First Amended Complaint.

39. Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "39" of the First Amended Complaint.

40. Defendants deny the truth of the allegations contained in paragraph "40" of the First Amended Complaint.

41. Defendants deny the truth of the allegations as to Phillips & Millman, LLP and Jeffrey T. Millman, Esq. and otherwise deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "41" of the First Amended Complaint.

42. Defendants deny the truth of the allegations contained in paragraph "42" of the First Amended Complaint.

43. Defendants admit that the statute of limitations had expired in February 2012 and otherwise deny the truth of the allegations contained in paragraph "43" of the First Amended Complaint.

**AS AND FOR A FIRST, SEPARATE  
AND DISTINCT CAUSE OF ACTION**

44. Defendants repeat and reiterate each and every response to Plaintiff's allegations in paragraph "1" through "43" as if fully set forth at length herein.

45. Defendants deny the truth of the allegations contained in paragraph "45" of the First Amended Complaint.

46. Defendants deny the truth of the allegations contained in paragraph "46" of the First Amended Complaint.

47. Defendants deny the truth of the allegations contained in paragraph "47" of the First Amended Complaint.

48. Defendants deny the truth of the allegations contained in paragraph "48" of the First Amended Complaint.

49. Defendants deny the truth of the allegations contained in paragraph "49" of the First Amended Complaint.

50. Defendants deny the truth of the allegations contained in paragraph "50" of the First Amended Complaint.

51. Defendants deny the truth of the allegations contained in paragraph "51" of the First Amended Complaint.

**AS AND FOR A SECOND, SEPARATE  
AND DISTINCT CAUSE OF ACTION**

52. Defendants repeat and reiterate each and every response to Plaintiff's allegations in paragraph "1" through "51" as if fully set forth at length herein.

53. Defendants deny the truth of the allegations contained in paragraph "53" of the First Amended Complaint.

54. Defendants deny the truth of the allegations contained in paragraph "54" of the First Amended Complaint.

55. Defendants deny the truth of the allegations contained in paragraph "55" of the First Amended Complaint.

56. Defendants deny the truth of the allegations contained in paragraph "56" of the First Amended Complaint.

57. Defendants deny the truth of the allegations contained in paragraph "57" of the First Amended Complaint.

**AS AND FOR A THIRD, SEPARATE  
AND DISTINCT CAUSE OF ACTION**

58. Defendants repeat and reiterate each and every response to Plaintiff's allegations in paragraph "1" through "57" as if fully set forth at length herein.

59. Defendants deny the truth of the allegations contained in paragraph "59" of the First Amended Complaint.

60. Defendants deny the truth of the allegations contained in paragraph "60" of the First Amended Complaint.

61. Defendants deny the truth of the allegations contained in paragraph "61" of the First Amended Complaint.

62. Defendants deny the truth of the allegations contained in paragraph "62" of the First Amended Complaint.

63. Defendants deny the truth of the allegations contained in paragraph "63" of the First Amended Complaint.

**AS AND FOR A FOURTH, SEPARATE  
AND DISTINCT CAUSE OF ACTION**

64. Defendants repeat and reiterate each and every response to Plaintiff's allegations in paragraph "1" through "63" as if fully set forth at length herein.

65. Defendants deny the truth of the allegations contained in paragraph "65" of the First Amended Complaint.

66. Defendants deny the truth of the allegations contained in paragraph "66" of the First Amended Complaint.

67. Defendants deny the truth of the allegations contained in paragraph "67" of the First Amended Complaint.

68. Defendants deny the truth of the allegations contained in paragraph "68" of the First Amended Complaint.

69. Defendants deny the truth of the allegations contained in paragraph "69" of the First Amended Complaint.

**JURY DEMAND**

70. This allegation does not require an answer.

**AFFIRMATIVE DEFENSES**

**AS AND FOR A FIRST AFFIRMATIVE DEFENSE**

71. Plaintiff's First Amended Complaint fails to state a cause of action for which relief may be granted as against Defendants.

**AS AND FOR A SECOND AFFIRMATIVE DEFENSE**

72. Plaintiff's First Amended Complaint fails to establish that the Defendants' conduct fell below the applicable standard of care.

**AS AND FOR A THIRD AFFIRMATIVE DEFENSE**

73. Defendants exercised due care and diligence in all matters alleged in the First Amended Complaint.

**AS AND FOR A FOURTH AFFIRMATIVE DEFENSE**

74. The documentary evidence provides Defendants with a complete defense to Plaintiff's allegations.

**AS AND FOR A FIFTH AFFIRMATIVE DEFENSE**

75. Any damages sustained by Plaintiff were a result of the acts or omissions of third persons or entities over which Defendants exercised no control.

**AS AND FOR A SIXTH AFFIRMATIVE DEFENSE**

76. Plaintiff cannot establish that she would not have sustained alleged damages "but for" Defendants' alleged actions or omissions.

**AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE**

77. Plaintiff cannot establish that "but for" Defendants' alleged negligence, she would have succeeded in her action against Dr. Bennett C. Rothenberg for medical malpractice.

**AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE**

78. Plaintiff failed to mitigate any damages she may have sustained as a result of the matters alleged in the First Amended Complaint.

**AS AND FOR A NINTH AFFIRMATIVE DEFENSE**

79. Plaintiff cannot establish that she has suffered actual and ascertainable damages.

**AS AND FOR A TENTH AFFIRMATIVE DEFENSE**

80. Defendants did not have a fiduciary relationship with Plaintiff.

**AS AND FOR A ELEVENTH AFFIRMATIVE DEFENSE**

81. Plaintiff's breach of fiduciary duty claim is duplicative of her legal malpractice claim.

**AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE**

82. Plaintiff's breach of contract claim is duplicative of her legal malpractice claim.

**AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE**

83. Defendants did not make any material misrepresentations of existing facts to Plaintiff with knowledge of the falsity and the intent to induce reliance.

**AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE**

84. Plaintiff did not justifiable rely on any alleged misrepresentations made by Defendants.

**AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE**

85. If the Plaintiff should settle the instant action with a party other than the Answering Defendants, said Defendants are entitled to a set-off as against such settlement pursuant to General Obligations Law Section 15-108.

**AS AND FOR A CROSS-CLAIM FOR CONTRIBUTION AGAINST  
DEFENDANT JOEL A. GROSSBARTH, ESQ.**

86. In the event that liability is found against Phillips & Millman, LLP and Jeffrey T. Millman, Esq., such liability being explicitly denied, then Phillips & Millman, LLP and Jeffrey T. Millman, Esq. shall be entitled to contribution from Defendant Joel A. Grossbarth, Esq. for his proportionate share of liability.

**AS AND FOR A CROSS-CLAIM FOR COMMON LAW INDEMNIFICATION AGAINST  
DEFENDANT JOEL A. GROSSBARTH, ESQ.**

87. In the event that liability is found against Phillips & Millman, LLP and Jeffrey T. Millman, Esq., such liability being explicitly denied, then Phillips & Millman, LLP and Jeffrey T. Millman, Esq. shall be entitled to common law indemnification from Defendant Joel A. Grossbarth, Esq. for any and all amounts arising from said liability as it was the acts, omissions and/or representations of Defendant Joel A. Grossbarth, and not Phillips & Millman, LLP and Jeffrey T. Millman, Esq., that caused Plaintiff's purported damages.

**AS AND FOR A CROSS-CLAIM FOR CONTRIBUTION AGAINST  
DEFENDANT TOGNINO & GROSSBARTH, LLP**

88. In the event that liability is found against Phillips & Millman, LLP and Jeffrey T. Millman, Esq., such liability being explicitly denied, then Phillips & Millman, LLP and Jeffrey T. Millman, Esq. shall be entitled to contribution from Defendant Tognino & Grossbarth, LLP for its proportionate share of liability.

**AS AND FOR A CROSS-CLAIM FOR COMMON LAW INDEMNIFICATION AGAINST  
DEFENDANT TOGNINO & GROSSBARTH, LLP**

89. In the event that liability is found against Phillips & Millman, LLP and Jeffrey T. Millman, Esq., such liability being explicitly denied, then Phillips & Millman, LLP and Jeffrey T. Millman, Esq. shall be entitled to common law indemnification from Defendant Tognino & Grossbarth, LLP for any and all amounts arising from said liability as it was the acts, omissions and/or representations of Defendant Tognino & Grossbarth, LLP, and not Phillips & Millman, LLP and Jeffrey T. Millman, Esq., that caused Plaintiff's purported damages.

**WHEREFORE**, the Defendants, PHILLIPS & MILLMAN, LLP and JEFFREY T. MILLMAN, ESQ. respectfully request that this court enter judgment as follows:

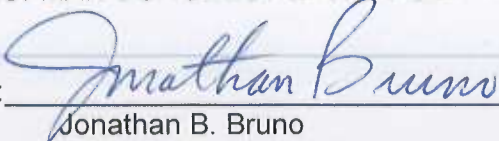
- a. Dismissing Plaintiff's First Amended Complaint;
- b. Granting to Defendants the costs, expenses, and disbursements resulting from this litigation, including attorneys' fees;
- c. Granting to Defendants judgment on their cross-claims against co-defendants,  
and

d. Awarding such other and further relief as this court deems just, necessary, and proper.

Dated: New York, New York  
October 30, 2013

Respectfully submitted,

KAUFMAN BORGEEEST & RYAN LLP

By:  \_\_\_\_\_

Jonathan B. Bruno

Deborah M. Zawadzki

Attorneys for Defendants

PHILLIPS & MILLMAN, LLP and

JEFFREY T. MILLMAN, ESQ.

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KBR File No.: 291.005

To: Steven T. Halperin, Esq.  
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Joel A. Grossbarth  
29 Linden Court  
New City, New York 10956

Tognino & Grossbarth, LLP  
c/o Joel A. Grossbarth  
29 Linden Court  
New City, New York 10956

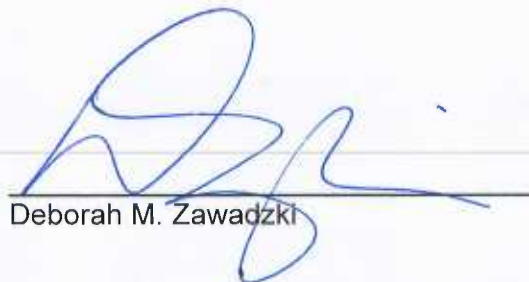
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Answer has been served via ECF and by first-class mail, postage prepaid, on October 30, 2013 upon the attorneys for the parties at the addresses listed below:

Steven T. Halperin, Esq.  
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Deborah M. Zawadzki